No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ALL STATES FREIGHT, INC., ET AL., *Appellants*

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court For the District of Connecticut

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BRIEF FOR THE APPELLANTS

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CITATIONS

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I

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (R. 39-49), was handed down on July 23, 1963, and is reported at 221 F. Supp. 370. The report and order of the Interstate Commerce Commission (R. 9-31) is dated December 28, 1961, and appears at 315 I.C.C. 419.

II

JURISDICTION

The judgment of the District Court (R. 50-51), was entered September 16, 1963, and notice of appeal was filed in that Court by these appellants (R. 51-53), on November 2, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1 (1960); *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81 (1961); and *United States* v. *Drum*, 368 U.S. 360 (1962). Probable jurisdiction was noted on March 30, 1964. (R. 386)

III

STATUTES INVOLVED

This case involves the application of the Congressional policy for the regulation of transportation as set forth in the Interstate Commerce Act. The provisions of that Act which are particularly pertinent are as follows:

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges

for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(6) of the Interstate Commerce Act, 49 U.S.C. 1(6)

"It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2 of the Interstate Commerce Act, 49 U.S.C. 2

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1)

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference, or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, associ-

ation, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3)

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

IV

QUESTIONS PRESENTED

1. Whether the court below acted properly in setting aside the order of the Interstate Commerce Commission upon the ground that the Commission has already effectively legislated the modification of the meaning and purpose of Section 1(6) and ought not now to "boggle" [1] at the final step.

2. Whether a finding by the court below of changed economic conditions is a proper basis for setting aside

[1] Decision of the Court below (R. 44), 221 F. Supp. at p. 375.

the Interstate Commerce Commission order which applied the statute as enacted by Congress.[2]

3. Whether the court below properly substituted its judgment for that of the Interstate Commerce Commission as to the effect of a rate proposal upon the historic rate structure of the carriers while, at the same time, ignoring the factual findings of the Commission upon which that agency's judgment was predicated.

4. Whether the court below acted properly in setting aside as unsupported the decision of the Interstate Commerce Commission which held the rate proposal under investigation to constitute a destructive competitive practice where the evidence showed and the Commission found that the proposed rates would adversely affect the proponent thereof as well as competing carriers.

5. Whether the court below acted properly in setting aside an order of the Interstate Commerce Commission upon the ground that the Commission's jurisdiction may be adequately exercised under provisions of law other than the one upon which the Commission's order was based.

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[2] Thus, the court below is in direct conflict with the three-judge Court in *Pennsylvania Truck Lines, Inc.* v. *United States*, 219 F. Supp. 871 (W.D., Pa. 1963) which sustained a decision of the Interstate Commerce Commission saying (219 F. Supp. at p. 875):

> "While there may be some merit to the plaintiff's contention that changed conditions in the transportation industry since the enactment of the Interstate Commerce Act requires a reassessment of the National Transportation Policy with respect to railroads, this Court should not become the vehicle for reshaping the laws which Congress has written. The plaintiff's appeal in that regard must be to Congress itself. The complaint must be dismissed."

V

STATEMENT OF THE CASE

The decision of the court below set aside as erroneous a decision of the Interstate Commerce Commission holding certain rate schedules published by the railroad appellees to be in violation of the Interstate Commerce Act. Those schedules were first published by the New Haven Railroad about the middle of the year 1959 and thereafter other railroads serving New England, namely, the New York Central, the Boston and Maine, and the Maine Central established similar schedules for competitive reasons. (R. 10) The other railroad appellees were parties to the tariffs as connecting carriers. Although the Commission initially suspended the rates for the seven month statutory period, the suspension was vacated upon petition of the railroads. The Commission, however, continued its investigation into the lawfulness of the rates which culminated in the decision that is now before this Court.

The rates involved were specified to apply from New England origins to Chicago and East St. Louis, Illinois. They were denominated as applicable to shipments of "freight-all kinds" and are commonly referred to as all-commodity rates. The considered rates differ from the usual or traditional all-commodity rates in that they were published to apply on straight carload shipments of single commodities as well as on carload shipments of mixed commodities. The schedules were published in Section 2 of a tariff, Section 1 of which named previously established all-commodity rates which apply only on mixed shipments containing at least five commodities, no one of which constitutes more than fifty per cent of the total weight of the shipment. (R. 10-11)

Although the tariff schedules excepted a few commodities from the rates at issue, it is apparent that by virtue of their application on straight or mixed shipments they would apply for the transportation of any of literally thousands of commodities which may move in interstate commerce in either straight or mixed carload shipments.[3]

The only railroad which introduced evidence in support of the described rates was the New Haven, the other three proponents taking the position that they simply published the rates in order to remain competitive with the New Haven. (R. 10) The rates are stated in cents per hundred pounds and vary in accordance with the weights of the carloads shipped, ranging from the highest rates per hundred-weight applicable to shipments of 20,000 pounds to the lowest rates applicable to shipments of 70,000 pounds. (R. 11) The level of the rates ranges from a high of 45 percent of first class to a low of 19 percent of first class. (Exhibit 1, R. 109, 259) And by reason of their virtually all-inclusive character they defeat all other and higher rates published by the railroads to apply upon specified individual commodities or upon described commodity groupings, or other categories or articles grouped for rate-making purposes. As such the considered rates are the highest rates which would be charged for rail boxcar service. (R. 297)

The purpose underlying the rates, as disclosed by evidence offered by the New Haven, was to compete with the Plan III trailer-on-flatcar (TOFC) service of other railroads and to attract and retain high-grade

[3] The commodities excluded from the rates are: livestock; explosives; military equipment; perishable freight; plumbers goods; stoves, ranges, and parts; furniture; furnaces, radiators, and parts; china, crockery, and earthenware; and refrigerators. (Exhibit 1, R. 111, 259)

tonnage which might otherwise move by truck. (R. 11) The primary genesis of the rates was clearly the TOFC competition of other railroads and this is the reason that the rates in issue were limited to shipments moving to Chicago and East St. Louis, the only destinations for which Plan III TOFC rates were then in effect from New England origins. (R. 268)

Moreover, in the proceedings before the Commission the New Haven introduced considerable evidence to show its difficulties in performing Plan III TOFC service because of physical limitations on its lines. That evidence also discloses that those physical limitations were eliminated by September of 1959 and that thereafter the New Haven was able to render a Plan III TOFC service comparable to that of other railroads. (Exhibit 1, R. 105, 259, and R. 268, 332, 340-341) It must also be noted as significant that the Plan III service to which the New Haven pointed as making the considered any-commodity rates competitively necessary was the service of the New York Central and the Boston and Maine. Yet those very railroads were parties to the proceedings before the Commission, were plaintiffs in the court below, and are appellees before this Court in defense of the rates condemned by the Commission.

In its decision the Commission made specific reference to evidence offered by the New Haven for the apparent purpose of demonstrating the effect of the rates in issue on the rail proponents. That discussion (R. 11-12) is of the utmost significance for it includes findings of fact upon which the Commission's conclusions were based which are totally ignored in the decision of the court below. As the Commission found, the New Haven's evidence (Exhibit 28, R. 200, 305) demonstrates that the considered rates resulted in the New Haven's transporting more than 4 million pounds

of additional traffic for $129.00 in added gross revenue, amounting to less than one-third of a cent in revenue for each additional 100 pounds of traffic moved. (R. 12) Necessarily, when the additional costs of providing the additional service are considered the inexorable conclusion is that the considered rates caused the New Haven to suffer a substantial decrease in net revenue. Analysis of Exhibit 28 will permit a graphic demonstration of the point. For this purpose it is fair to assume that all of the traffic moved in carloads of 40,000 pounds, a reasonable median considering the varying loading characteristics of all commodities. The service rendered under the considered rates is virtually the same as that of the ordinary rail boxcar service (R. 269)[4] and in consequence it is fair to apply cost data as shown in Table 1 of Exhibit 33 (R. 209, 365) to both types of service. The following table, summarizing Exhibit 28 on the basis described, shows the startling effect of the rates in issue:

	Boston to Chicago	
	At Rates In Issue	At Normal Rates
Weight Transported	18,452,368	14,158,891[5]
Cost per cwt. of Providing Service	92.5 cents[6]	92.5 cents[6]
Cost of Service	$170,684.42	$130,969.73
Revenue Received	$207,414.15	$207,284.62
Net Above Out-of-Pocket Cost	$ 36,379.73	$ 76,314.89

[4] The only differences in the service is that special privileges such as promiscuous loading and marriage of cars, which are explained by the railroads as being for their own economy, do not apply for service under the considered rates. (R. 269-271)

[5] Represents the portion of the traffic shown on Exhibit 28 which the New Haven assumes would have moved by rail at normal rates. (R. 301-302)

[6] Out-of-pocket cost shown in Exhibit 33. (R. 209, 365) for shipment of 40,000 pounds.

From the foregoing it is patent that the evidence before the Commission indicated that in transporting over 4 million pounds of additional traffic at the rates under investigation the New Haven Railroad secured net revenue over out-of-pocket costs of $39,585.16 *less* than it would have secured at its normal rates for a lesser volume of traffic. When it is considered that the rates involved represent the *maximum* level of rates to be applied on the bulk of the New Haven's west-bound traffic, the conclusion is inescapable that they are destructive of the New Haven's own revenue.

The Interstate Commerce Commission, after a brief recitation of the significant facts, gave consideration to the history of all-commodity rates, noting that in most instances they had applied only on mixed shipments and usually reflected the average carload rate basis for articles in the shipment thereby adhering to rather than departing from the requirements of Section 1(6) of the Act. (R. 13-14) It then observed that the rates at issue applied on straight as well as mixed shipments, and distinquished the few earlier decisions approving similar rates by observing that in those cases the level of the all-commodity rates was as high or higher than the carload commodity rates which would apply on the individual articles in a shipment. (R. 14) It also pointed out that all-commodity rates applying on straight shipments which would defeat other rates of the sponsoring carrier or carriers had been condemned in earlier decisions. (R. 14)

Upon consideration of the entire record and the history of all-commodity rates, the Commission turned its attention to Section 1(6) of the Interstate Commerce Act [49 U.S.C. § 1(6)] and held that the provisions thereof apply with respect to all rates, not

merely to traditional "class rates". (R. 14-15) It then held that the rates under investigation, by virtue of their application on straight shipments of thousands of commodities which would otherwise be subject to higher rates, were clearly in derogation of classification principles and, therefore, in violation of Section 1(6) of the Act. It also held that the sweeping application of the rates would undoubtedly break down the just and reasonable structures of the carriers which are necessary to the maintenance of an adequate national transportation system. It finally held that the considered rates constitute a destructive competitive practice under the National Transportation Policy. (R. 15)

After reaching its conclusion that the rates of the New Haven and the other railroads were unlawful, the Commission set forth additional reasoning in support of its definite conclusions. It noted particularly the competitive situation confronting the carriers and, with unassailable logic, held that these competitive problems must be met within the limits of the regulatory standards established by Congress. It further observed that should a change in those standards be required only Congress has the power to effectuate such modification. (R. 15-17)

The United States District Court for the District of Connecticut set aside the Commission's order on the ground that the provisions of Section 1(6) of the Interstate Commerce Act have no bearing in this instance and that the issues ought never to have been framed thereunder (R. 46); that Sections 1(5), 2, and 3 of the Interstate Commerce Act [49 U.S.C. §§ 1(5), 2, and 3] vest the Commission with ample powers to regulate rates and charges without reference to Section

1(6) (R. 44); that by past administrative decisions the Commission has effectively legislated a modification of Section 1(6) and ought not now to "boggle" at the final administrative repeal thereof (R. 44); that in any event Section 15a(3) [49 U.S.C. § 15a(3)] forecloses the Commission from condemning the "all-freight" rates inasmuch as they have been shown to produce revenues in excess of out-of-pocket costs (R. 45-46); and that even though by its terms the National Transportation Policy pervades the entire Act, its proscription of destructive competitive practices should not have been invoked by the Interstate Commerce Commission in this instance (R. 46).

VI

SUMMARY OF ARGUMENT

The order of the Interstate Commerce Commission which the decision below would set aside rests upon the rational finding that "all-freight" rates applied to thousands of commodities without relation to classification principles would have a direct and destructive effect upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. This, the Commission held to be in violation of Section 1(6) of the Interstate Commerce Act and of the National Transportation Policy. The decision below categorically held that the "all-freight" rates cannot be violative of Section 1(6) because the purpose of that section was to protect shippers by controlling the maximum charges for transportation and this purpose is fulfilled by the maintenance in being of class rates even though competitive conditions lead to the furnishing of service through variously constructed rates at lower charges.

The holding below is plainly erroneous because it prohibits invocation of Section 1(6) to condem unreasonably low rates. The decision would provide a means whereby carriers could escape the Commission's regulatory power insofar as minimum rates are concerned simply by reducing classifications rather than rates. Moreover, the decision below would frustrate the Commission's duty to consider general and comparative levels in the market values of the various classes and kinds of commodities when fixing transportation rates. It is from the great body of rates, consisting of both class rates and specific commodity rates, that the carriers must secure the revenues necessary to the performance by them of adequate transportation service to the public. All-freight rates may, in certain circumstances, be reasonably related to this great body of rates and, therefore, not constitute a threat to the general structure. On the other hand, all-freight rates which cut across all classification considerations and which would have the effect of reducing the net income of the proponent carriers are themselves unlawful.

The conclusion by the Commission upon which it based its order requiring cancellation of the "all-freight" rates is that they constitute a destructive competitive practice in contravention of the National Transportation Policy and in violation of Section 1(6). This, the Commission said, followed from the fact that they applied to thousands of commodities without relation to classification principles and without regard to the destructive effect they would have upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. The unchallenged findings of the Commission were that the considered all-freight rates will reduce rather

than increase the net revenues of the proponent railroads, and will put in jeopardy the just and reasonable rate structure to which the carriers must look for revenues adequate to permit the continued provision of service to the public. The decision below brushes aside these solemn findings and conclusions upon the ground that they are "not clear" and rejects the Commission's ultimate conclusion upon the ground that the rates are above out-of-pocket cost. The error of the decision below in this connection lies in the fact that the issues do not arise under Section 15a(3) of the Act and in the further fact that it ignores the finding of the Commission that the all-freight rates would result in a reduction of net income for the railroads here involved rather than an increase, constituting thereby the very type of destructive competitive device which was condemned by the Supreme Court in *United States* v. *New York, New Haven and Hartford R. R. Co.*, 372 U.S. 744 (1962).

Finally, the decision below erroneously held that carrier rates are adequately policed under other sections of the Act and therefore need not meet the standard of Section 1(6). In effect the Court would require the Commission to repeal the provisions of Section 1(6) by administrative interpretation.

VII

ARGUMENT

A. The Court Below Erroneously Reversed Commission For Refusing to Modify Statute

Section 1(6) of the Interstate Commerce Act requires carriers to establish, maintain, and enforce just and reasonable classifications of property and further requires that rates for the transportation of property be made with reference to such classifications. The

obvious significance of the requirement is that all rates must bear a reasonable and proper relationship to each other, and the Commission, in the evaluation of any particular rate proposal, not only may but also must consider the impact of that proposal upon the total rate structure of the carriers. The serious error of the court below lies in its determination that the Commission may not disapprove the rate proposal on the ground of violation of Section 1(6) in that the proposal is improperly related to the lawfully established and existing rate structure.

While it is correct, as noted by the court below, that the requirement of just and reasonable classifications protects shippers from unduly high transportation charges by preventing a defeat of the Commission's maximum rate power, the court erred in failing to recognize that the requirement also protects carriers from unduly low transportation charges through a concomitant protection of the Commission's minimum rate power.

The court below set forth its mistaken view of Section 1(6) as follows (R. 44):

> "The just and reasonable classification requirement of § 1(6) was adopted in 1910 to give the Commission power to control classification, there being some doubt as to the existence of the power, and its purpose was to protect shippers by controlling the maximum charges for transportation of commodities. This purpose is fulfilled by the maintenance in being of class rates even though competitive conditions lead to the furnishing of service through variously constructed rates at lower charges. The practice of the Commission over the past 21 years, as pointed out by Commissioner Webb in his dissent in the instant case, was consistent with this interpretation, permitting competitively compelled departures from the

> classification in e.g. *All Freight to Pacific Coast*, 248 ICC 73, aff. *Pacific Inland Tariff Bureau* v. *United States*, 50 F. Supp. 376 (W.D. Wash. 1943), and cases cited, supra. We can see no difference in principle between those cases and the one before us and no sound reason for so interpreting § 1(6) as to prohibit such competitively compelled departures from classifications, within the established maxima, absent some other violation of the Act than the mere departure from the classification."

It is perfectly plain from the court's own language that the court considered Section 1(6) to be significant *only* in a maximum rate case. That is to say, the Court viewed the section as exclusively limited to supporting the Commission's maximum rate power as conferred upon the Commission in 1906.[7] The critical importance of the issue presented to this Court is well demonstrated by the statement of the court below rejecting the Commission's interpretation of Section 1(6) as having vitality with respect to rates other than maximum rates. The court's statement, which appears in the opinion immediately following the paragraph quoted above reads (R. 44-45):

> "The Commission fears that approval of these rates would be legislation on its part, apparently because it would be the final blow to classification as a control over minimum rates and a further weakening of its role as a 'giant handicapper.' Having permitted over a long period exceptional rates which actually move the vast preponderance of this traffic at rates below the class rates, it would seem that it has already effectually legislated or interpreted the modification of what it now claims was the original meaning

[7] The Hepburn Act, June 27, 1906, 34 Stat. 589, 49 U.S.C. 15.

and purpose of § 1(6). It is strange to find it boggling at this final step of so little effect on traffic actually moving under class rates.[8] In any case, we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15(a) (3). The record discloses no violation of these sections. It would appear that the Commission here invokes § 1(6) as a means of preserving a basis for the 'value of service' concept in rate-making referred to above, in a desire to hold fast to a past which has already slipped away beyond our reach."

As the court below noted, the Commission viewed the requirement of just and reasonable classifications for ratemaking purposes as also protecting its minimum rate power. Significant in this context is the fact that the minimum rate power, 49 U.S.C. 15(1), was conferred upon the Commission in 1920 by amendment of Section 15(1),[9] the section which also grants the maximum rate power and which specifically embraces within its terms the power to determine and prescribe just, fair, and reasonable individual or joint classifications. Obviously, just as an increase in classification might be used to defeat the maximum rate power so it is manifest that a decrease in classification might be used to defeat the minimum rate power. And if it may so be used, as the court below has held, the Com-

[8] While the court had noted that only about one per cent of rail carload traffic in the east moved on class rates (R. 42), the Commission had found that the rates in issue represent the highest level at which the *bulk* of the New Haven's west-bound traffic would move (R. 11), and had concluded that the rates were destructive of the rate structure generally, not just of class rates (R. 15).

[9] Transportation Act of 1920, 41 Stat. 484, 49 U.S.C. 15.

mission's regulatory tasks will be impossible of performance.

The Commission in its decision very carefully noted and explained that the term "classification" as used in Section 1(6) was broader than the specific classification used by carriers in the establishment of class rates and correctly stated that the Act requires *all* rates to be made with reference to just and reasonable classifications. That is to say the Commission recognized that the Act requires differential pricing of transportation to reflect the almost infinite variation between and among the articles and commodities which are transported in interstate commerce. Indeed, differential pricing is a necessity if the opinion of this court in *Baltimore & Ohio Railroad Co.* v. *United States*, 345 U.S. 146 (1953), is to have any significance. There the Court sustained an order of the Interstate Commerce Commission which required the railroads to transport certain kinds of fresh vegetables at charges which were below the computed out-of-pocket costs of such transportation, the Court holding that this was lawful if the total traffic of the railroads was sufficiently profitable to assure continued service.

It follows, of course, that if the Commission has the power to require the railroads to transport a given segment of traffic at less than cost, the Commission must likewise have the power to require the railroads to transport other traffic at rates substantially in excess of cost so that the ability of the railroads to meet the nation's needs with respect to the first category of traffic will be preserved. That is why Section 1(6) of the Interstate Commerce Act makes it "the duty of all common carriers * * * to establish, observe, and enforce just and reasonable classifications of property

for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed * * *." It is likewise why Section 2 of the Interstate Commerce Act makes it unlawful for any railroad "by any * * * device" to "charge * * * or receive from any person * * * a greater or less compensation for any service rendered, or to be rendered, in the transportation of * * * property * * * than it charges * * * or receives from any other person * * * for * * * a like and contemporaneous service in the transportation of *a like kind of traffic* under substantially similar circumstances and conditions." (Emphasis ours) It is likewise why Section 3(1) of the Act makes it unlawful for any railroad "to make, give or cause any undue or unreasonable preference or advantage to * * * any particular *description of traffic* * * * or to subject * * * *any particular description of traffic* to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Emphasis ours)

The Supreme Court has itself heretofore interpreted the Interstate Commerce Act as not only authorizing but requiring the Interstate Commerce Commission to see to it that the railroads maintain rates and charges which are just, reasonable, non-discriminatory, and non-preferential as between the various classes of traffic and the various classes and kinds of commodities. That was the thrust of the decision in *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658 (1930), which held that the Hoch-Smith Resolution, 49 U.S.C. § 55, had merely restated the requirements of the Interstate Commerce Act in that regard. The Commission itself called attention to this matter in its own report accompanying its order requiring that the rates under consideration be cancelled. (R. 16)

It should be observed that the court below in discussing Section 1(6) refers to numerous decisions to show that the practice of the Commission over the past twenty-one years has been consistent with the court's "maximum rate" doctrine (R. 44). However, reference to the Commission's report will disclose that it referred to many of those same decisions and pointed out that they differed from the instant case in that there the rates at issue did not constitute departures from the just and reasonable classifications required by Section 1(6) either because they reflected an average classification or because they were higher than the rates which would otherwise apply and thereby were not destructive of those rates. (R. 13-15).

Clearly, the court below failed to perceive the special significance of Commission decisions issued in a field of the Commission's particular competence. Plainly the requirement of Section 1(6) that *all* rates, class or commodity, meet the test of reasonable classifications was and is intended to protect both the maximum and minimum rate powers of the Commission. Certainly, if Congress had intended otherwise it would have so provided at the time it conferred the minimum rate power on the Commission in 1920, some ten years after having established the requirement that carriers maintain just and reasonable classifications for ratemaking purposes.[10] It follows, therefore, that the publication of a rate which for all practical purposes treats as one not only both straight and mixed shipments but also virtually any kind of commodity for the purpose of determining transportation charges must necessarily violate the basic requirement of Section 1(6) that just

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[10] Mann-Elkins Act, June 18, 1910, 36 Stat. 544, 49 U.S.C. § 1(6).

and reasonable classifications *shall* be maintained for purposes of ratemaking.

The court below has declared that the rates in issue may not be condemned under Section 1(6) of the Act even though they constitute a departure from just and reasonable classifications (R. 44). Thus the court below judicially modified the words of the statute in plain derogation of the rule that a court must construe what Congress has written and cannot add to, subtract from, delete, or distort the words used.[11] Similarly it is not within the judicial function to rewrite a statute so that it will authorize what the court thinks should be authorized.[12]

The court below has tried to rationalize its departure from principle and its modification of the law as enacted by Congress by adverting to economic conditions which have changed since the law was enacted. These changed conditions were also recognized by the Commission which soundly noted that it was the province of Congress and not the Commission to make any necessary changes in the law (R. 16-17). That fundamental proposition in terms peculiarly applicable here, was well stated by the three-judge court in *Pennsylvania Truck Lines, Inc.* v. *United States,* 219 F. Supp. 871, 875 (W.D., Pa. 1963) where, in sustaining a decision of the Interstate Commerce Commission the Court said:

> "While there may be some merit to the plaintiff's contention that changed conditions in the transportation industry since the enactment of the Interstate Commerce Act require a reassessment of the National Transportation Policy with re-

[11] *62 Cases of Jam* v. *United States,* 340 U.S. 593 (1951).

[12] *Story* v. *Snyder,* 184 F. 2nd 454 (D.C. Cir., 1950).

spect to railroads, this Court should not become the vehicle for reshaping the laws which Congress has written. The plaintiff's appeal in that regard must be to Congress itself. The complaint must be dismissed.

B. The Court Below Misinterpreted the Commission's Decision

As a corollary to its holding that the Commission should have modified the meaning of Section 1(6) to fit changed economic conditions, the court below also said that it did not view the rates in issue as being in violation of that section. To this end, the court indulged in a dissertation upon the development of class rates, commodity rates, and all-commodity rates (R. 40-44). In the course thereof the court enumerated factors considered in the classification of commodities for transportation, including value of service, and stated that the former monopoly position of the railroads allowed them to observe these factors, particularly value of service, well into this century. (R. 41).

The court concluded that departures from, i.e., violations of, just and reasonable classifications when competitively compelled do not violate the act. It endeavored to support its holding by referring to a number of Commission decisions in which all-commodity rates had been approved and saying that it could see no difference in principle between those cases and the decision of the Commission here (R. 44). Therein lies a vital deficiency in the court's decision for the decision of the Commission clearly recognized *the distinction in principle* between those earlier cases and the one at bar by pointing out that the all-commodity rates heretofore approved have generally applied on a limited number of commodities and required the mixing of two or more commodities in order to reflect the average carload rate for the commodities

covered, thereby adhering to, rather than departing from classification principles (R. 14). The Commission further observed that in those few cases where all-commodity rates not limited to mixed shipments were approved, the rates were at the same level or higher than the carload commodity rates and thereby did not represent departures from the classifications required by Section 1(6) of the Act. Importantly, the Commission noted that where all-commodity rates applicable on straight shipments would constitute departures from classification as required by the Act they have been condemned (R. 14).

Thereafter, the Commission discussed the rates here in issue, having already recognized that they range from 45 to 19 per cent of first class and constitute the highest level at which the bulk of the New Haven's westbound traffic would move. The Commission noted further that thousands of commodities are included in the adjustment without relation to classification principles and concluded that the rate proposal clearly violates Section 1(6) (R. 15).

The court, without referring to the foregoing specific findings and conclusions of the Commission, said that the Commission appears to have invoked Section 1(6) "as a means of preserving a basis for the 'value of service' concept in ratemaking * * * in a desire to hold fast to a past which has already slipped away beyond our reach."[13] (R. 44-45) The plain significance of the decision is that the requirement that rates be made with reference to just and reasonable classifications of property can no longer be an operative standard of ratemaking because the legislation was enacted at a time when the railroads "were powerful monopolies."

[13] The Commission decision contains no reference to the "value of service" concept.

(R. 44-45) It would be serious enough if the court below had held that the Commission misapplied the factors and criteria which go into just and reasonable classifications for it would thereby have substituted its judgment for that of the administrative agency in a field where the agency is vested with broad discretion.[14] It is even more serious where the holding

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[14] *Alabama Great S. R. Co.* v. *United States*, 340 U.S. 216 (1951); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592-593 (1949); and *United States* v. *I.C.C.*, 221 F. Supp. 584, 586-587 (D.C., 1963) where the court said:

"The fixing of railroad freight rates is a complex and intricate undertaking requiring expert knowledge and skill. It differs from the determination of rates to be charged by public utilities of other types. Most public utilities, other than those in the transportation field, deal in a single commodity or service, such as gas, electric power, telephone service, and the like. In such cases, it is necessary to calculate what income is likely to be received by the utility if the rate is fixed at a specific amount, and ascertain whether the expected earnings would result in a fair return. In the case of transportation facilities, however, rates must be established on hundreds, or possibly thousands, of different commodities. *The question then becomes, in part, whether the entire rate structure comprising the sum total of the income to be realized from all shipments of these many types, will result in a fair return to the carrier.* No one freight rate may be considered individually. The entire group with its innumerable ramifications must be evaluated as a whole, like a piece of tapestry composed of thousands of individual threads of various colors and hues. It is a resultant of many elements. Economic effects of particular rates on communities which they affect, and on lines of business to which they relate; the extent to which they are likely to attract shipments to transportation facilities of a specific type or draw it to competitors; the amount of charges that the traffic will bear and numerous other factors must all be weighed in determining the reasonableness of freight rates. The task comprehends much more than mathematical computations. The outcome depends on sound judgment and keen discernment based on an appraisal of the various considerations and their interrelation. Obviously strong reliance must be placed on the expertise of the regulating agency." (Emphasis added)

was, as is the case here, that the Commission may not apply the standards of Section 1(6) to rates applying on virtually any commodity in straight shipments, with only very limited exception, which the Commission found would defeat all higher rates and would thereby destroy the just and reasonable rate structure upon which all carriers must depend.

Under the holding of the court below the Commission is powerless to regulate transportation rate structures as a whole and is thereby powerless to accomplish the goals of regulation embodied in the Act and set forth in the National Transportation Policy as recognized by this Court in *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658 (1930), *and Baltimore & Ohio Railroad Co.* v. *United States,* 345 U.S. 146 (1953).

C. The Decision Below Rests Upon Plain Disregard of Facts Found By the Commission

The court below would set aside the Commission's conclusion that the considered rates constitute a destructive competitive practice under the National Transportation Policy by declaring that the finding is not understandable to the court and in any event could not be made under Section 15a(3) as interpreted by the same court in *New York, New Haven and Hartford R. Co.* v. *U. S.*, 199 F. Supp. 635 (1961), vacated by this Court in *I.C.C.* v. *New York, N.H. & H. R. Co.,* 372 U.S. 744 (1963).

The error of the Court below here is twofold. First, the National Transportation Policy specifies that *all provisions* of the Act shall be administered and enforced with a view to carrying out that policy. The rates in question do not present issues under Section 15a(3) for their primary genesis lies in an attempt by

the New Haven to meet the trailer-on-flatcar competition of other railroads. The issues clearly arise under Section 1(5), 1(6), 2, and 3(1). If the Act is to be construed for the first time as not permitting a finding of destructive competition except in conjunction with the resolution of issues under Section 15a(3) the departure from the explicit provisions of the Act and the National Transportation Policy can only be initiated by Congress.

The second error of the court below on the question of destructive competition is that the considered rates clearly meet the court's own test in that they are hurtful to the proponents thereof as well as to competitors. In this regard the Commisison specifically found that under the considered rates the New Haven Railroad transported 4 million pounds more freight than it would have handled in their absence for added gross revenue of only $129.00. Most assuredly, from that finding it is obvious that the considered rates result in a significant decrease in the New Haven's net revenue and thereby a deterioration in its financial position. In this context it is worthy of note that Division 2 of the Commission in its report on the proposed rates (R. 94-105, 313 I.C.C. 275) made specific note of the contention of the protestants, appellants here, that for every 30,000 pounds of traffic diverted from motor carriers by the proposed rates, 100,000 pounds are diverted from the New Haven's own higher priced box car service (R. 98, 313 I.C.C. at page 278). The evidence abundantly supports the Commission's conclusion and, bearing in mind the Commission's factual findings and the implications which logically follow therefrom, the Commission's statement of its conclusion is vastly more intelligible than is the obscure statement of the

court below. The Commission's conclusion reads (R. 15):

> "The rates here under investigation, however, apply not only on mixed but also on straight shipments of numerous commodities which would otherwise be subject to higher rates. Thousands of commodities are included in this sweeping adjustment without relation to classification principles, and without regard to the destructive effect which the proposed rates would have upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. If not restricted to reasonable mixtures, such rates could, and no doubt would, break down these rate structures to the detriment of carriers and shippers alike. The evidence is clear that such result would follow approval of the proposed rates. In these circumstances, the rates must be condemned as constituting a destructive competitive practice in contravention of the national transportation policy, and also as in violation of section 1(6) of the act."

D. The Court Below Has Usurped the Congressional Prerogative of Specifying the Standards of Regulation

There can be no question but that the court below has intruded upon the administrative jurisdiction of the Commission itself. It is the Commission's function to determine the transportation needs of the country and so to regulate the carrier members of the national transportation system in terms of both operations and rates as to meet those needs. In the performance of that task the Congress has established clear standards for the Commission to follow, i.e., sections 1(5), 1(6), 2, and 15a(3), and *it is beyond the authority of the court below to declare that one of those standards may be disregarded because a rate proposal does not appear to the court to violate other standards.*

The basis for the court's declaration that the case should not have been decided under Section 1(6) (R. 46) is the theory that economic circumstances are significantly different than when Section 1(6) was enacted. But this is immaterial for it was not the function of the court below to pass upon the wisdom of the Commission's decision, and neither the Commission nor the court is authorized to change the statute. Rather, it was the function of the court to test the Commission's action against the congressional mandate. See *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 15 (1960). The court below erred in reversing the Commission for the latter's refusal to disregard a specific provision of law. The court also erred in reversing the Commission for invoking the National Transportation Policy, permeating as it does the entire Interstate Commerce Act because in the court's view that policy relates only to one section of the Act.

The necessary result of the holding of the court below is to deprive the Interstate Commerce Commission of a power delegated to it by Congress. Thereby the holding would also deprive the Commission of the ability to discharge the duties imposed upon it by Congress. Plainly, the decision below must be vacated and set aside by this Court.

CONCLUSION

This proceeding presents issues of nationwide significance which are of tremendous importance to the regulation of all transportation in interstate and foreign commerce. The decision of the court below plainly lays down a new interpretation of the Interstate Commerce Act, said by the court to be made necessary by

reason of changed economic circumstances and past legislative modification through administrative decisions. Moreover, the decision of the court below clearly holds that the meaning of the Interstate Commerce Act not only may but also should be modified to fit the economic circumstances existing at the time of decision—in short, a rule by men rather than a rule by law.

WHEREFORE, the appellants respectfully pray that this Honorable Court vacate and set aside the judgment of the court below and remand the case to it with instructions to dismiss the complaint.

Respectfully submitted,

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